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IN THE
SUPREME COURT OF THE UNITED STATES.

THE CHEROKEE NATION AND
THE UNITED STATES,
Appellants.

vs.

CHARLES JOURNEYCAKE,
*Principal Chief of the
Delaware Indians,*
Appellee.

No. 619.

Statement of the Case.

On October 1, 1890, an act of Congress was approved by the President, which contained, among others, the following provisions:

"SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the posses-

sion of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degree west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee Council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement."

Under authority of this act the suit at bar was brought by the Delaware Indians residing with the Cherokees, nominally to recover from the Cherokee Nation a ratable proportion of the proceeds of certain grazing leases on lands lying west of the 96th degree in the Indian Territory, which proceeds the Cherokees are charged with having appropriated to themselves (Cherokees by blood), in violation of the agreement between the Cherokees and Delawares of April 8, 1867, under which the said Delawares became incorporated with the Cherokees, which agreement was in turn made under authority of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation.

Thus it will be seen that while this suit, upon its face, involves only the distribution of some five hundred and odd thousand dollars of lease money, there lies behind it the question of title to the land itself, as upon the interest of the Delawares *in the soil* depends their right to participate in the proceeds of the grazing leases. These lands have, since the commencement of this suit, been sold to the United States for the sum of \$8,595,736.12, of which the sum of \$1,660,000.00 is retained subject to the result thereof.

The entire question hinges upon the interpretation to be given to a phrase in the contract between the Cherokees and Delawares, as follows:

"On the fulfilment by the Delawares of the foregoing stipulations all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares, so incorporated into the Cherokee Nation, shall in all respects be regarded as natives Cherokees."

The question being, did the "rights and immunities" and "national funds," here mentioned, refer to civil and political rights, and to the national fund, as it then existed, or did these expressions include the whole Cherokee possessions, as well that part upon which said contract was silent, as those parts to which is specifically referred and specifically described.

At the time the agreement mentioned was entered into, the Cherokee Nation was possessed of the following tracts or bodies of land:

	Acres.
"Strip" lands in Kansas (about)	400,000
"Neutral" lands in Kansas (about)	1,000,000
Lands west of 96° Indian Territory (about) .	8,000,000
Lands east of 96° Indian Territory (Home Reservation), about	5,000,000

The question presented for the determination of the court is whether the Delaware Indians are entitled, by virtue of the provisions of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation (14 Stat., 803), and the agreement entered into on the 8th day of April, 1867, between the Cherokee Nation and the Delawares, to a ratable interest in all these lands and the proceeds thereof, or only to such parts as are particularly mentioned and specified in said agreement.

This determination involves the consideration of article four of the treaty of 1866 between the Delaware Indians and the United States (14 Stat., 794), the fifteenth article of the treaty of 1866 between the Cherokee Nation and the United States (*Id.*, 803), and the agreement between the Cherokee Nation and the Delawares of April 8, 1867.

Briefly stated, the judgment below holds that under the terms of said agreement the Delaware Indians became joint owners with the Cherokees in all the common property of the latter, wherever situated, and hence are entitled to share in all profits and benefits arising from or on account of any such property, whether described in said agreement or not.

The contention of appellants, on the other hand, is that by said agreement a certain specific and limited quantity of land was sold to said Delawares, and that for a certain other sum they were admitted to citizenship in the Cherokee Nation with equal political and civil rights, but acquired no property rights beyond those particularly mentioned and declared in said instrument, and hence they are not entitled to share in any profits arising from lands not so particularly mentioned in said agreement, and that they are entitled to no part or share in the proceeds of leases of lands lying west of the ninety-sixty degree, as those lands were not mentioned in said agreement.

For more ready reference we reprint the two articles and contract in the order of execution.

The fourth article of the Delaware treaty, by which they ceded their Kansas lands, is as follows (July 4, 1866):

“The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian

country, to be selected by the Delawares in one body, in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, *a quantity equal to one hundred and sixty (160) acres for each man, woman, and child* who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of land in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States, and also surveyed as public lands are surveyed, when the Delaware Council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior."

The fifteenth article of the Cherokee treaty (corresponding to the amnesty treaties with the several five civilized tribes made at about the same time) is as follows (July 19, 1866):

"ARTICLE 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, *on unoccupied lands east of 96°*, on such terms as may be agreed upon by any such tribe, and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organizations, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to *preserve* their tribal organizations, and to maintain their tribal laws, customs and usages, not inconsistent with the constitution and

laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in case of disagreement the price to be fixed by the President.

“And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians, who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.”

The agreement between the Cherokees and Delawares, is as follows (April 8, 1867):

“Whereas, by the fifteenth article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of the 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus

located and the Cherokee Nation, subject to the approval of the President of the United States; and whereas, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country south of Kansas was provided for; and, in the fourth article whereof, an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of which by the Cherokees to the United States was then contemplated; and whereas, no such cession of land was made by the Cherokees, to the United States, but, in lieu thereof, terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and whereas, a full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation.

“Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

“The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the ‘Indian country,’ to which list may be added, only with the consent of the Delaware Council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto, and the selection of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee Reservation east of said line of 96° not already selected and in possession of other parties, and in case the Cherokee lands shall

hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivision when surveys are made—*that is to say, one hundred and sixty acres for each individual—shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation*, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with, in any manner whatever, without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof.

“Provided, that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

“And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware fund now held or hereafter received by the United States a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

“And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said land; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation at their market value at the date of such transfer.

“And the said Delawares further agree that there shall be paid from their funds now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to the existing Cherokee national fund, that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation. And for the purpose

of ascertaining such relative numbers, the registers of the Delawares herein referred to with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculations as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculations as to the Cherokees.

"And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is \$678,000.

"And the Delawares further agree, that in calculating the total amount of said national fund, there shall be added to the said sum of \$678,000 the sum of \$1,000,000, being the estimated value of *the Cherokee neutral lands in Kansas*, thus making the whole Cherokee national fund \$1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

"Provided, that as the \$678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the pro rata contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the pro rata contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

"All cash and all proceeds of stocks, whenever the same may fall due or be sold, received by Cherokees from the Delawares under the agreement, shall be invested and applied in accordance with the twenty-third article of the treaty with the Cherokees of August 11, 1894.

“On the fulfilment by the Delawares of the foregoing stipulations all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

“And the children hereafter born of such Delawares, so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.”

Argument.

While the language to be interpreted is brief and apparently simple, there is such a gross and unconscionable inadequacy of consideration for the benefits claimed by the appellees and confirmed by the decision of the court below that that fact alone would challenge an inquiry into the circumstances leading up to the making of the contract.

The objections to the contention of appellees and the judgment below seem to arrange themselves under three propositions: first, the purpose sought to be subserved by the treaties and agreement, as manifested in the circumstances surrounding and leading up to them; second, the plain intendment of the contract, as appears from its terms; third, the gross inadequacy of consideration for the benefits claimed.

First then as to—

The History Surrounding and Leading up to the Treaties and Agreement in Question.

This inquiry, we apprehend, will be considered pertinent and proper. In the recent case of *Smith vs. Townsend*, in this court, in which the writers of this brief had the honor to appear for the appellee, the court say:

“It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy.” (148 U. S., 494.)

It will be remembered that in the five civilized tribes of the Indian Territory slavery existed, prior to the war, as it did in the Southern States. This territory was a border land between the North and South, and became

the theater of important military operations. A part of these people allied themselves with the Southern cause, while many joined the armies of the North.

The time when the treaties and agreement under consideration were entered into (1866-'67) was immediately after the close of the war, when the interest and attention of Congress was absorbed in questions of reconstruction and reorganization. The bondsmen of the Cherokees had been emancipated as the bondsmen throughout the Southern States had been. The property of the Cherokees who had joined the Southern cause had been extensively confiscated, and there was a widespread condition of insecurity, uncertainty, and doubt. With this condition of affairs in view, an adjustment of the civil and political establishments of the five civilized tribes was contemplated, on the same general lines as the Southern States were being reconstructed, and with the same objects, and no other, in view. To this end, during the year 1866, treaties were negotiated with each of these tribes. In all these, amnesty provisions were incorporated, and provisions looking to the security of civil and political rights in the various contending factions throughout this Territory on the lines contemplated in the fourteenth and fifteenth amendments to the constitution of the United States, and the various acts of Congress in relation thereto. To more perfectly insure the success of this plan there was also incorporated in each of these several treaties a provision whereby it was agreed on the part of the tribes that:

"A council consisting of delegates elected by each nation or tribe, lawfully resident within the Indian Territory, may be annually convened in the said Territory, to be organized as follows," etc., etc.

Following this were provisions providing in detail for the organization and maintenance of a general legislative

body, with delegates from each of the several tribes, which should secure to all the inhabitants of said Territory protection of person and property, and the enjoyment of equal political and civil rights. (See treaties with the several tribes, 14 Stat.)

While this plan never became wholly effective by being put into operation, each of the various treaties referred to was made in the same spirit and with the same general object in view. Upon the arrival of the Commissioners of the United States at Fort Smith, Ark., for the purpose of negotiating the treaties above referred to, including the Cherokee treaty under consideration in this case, the representatives of the various tribes assembled were informed that the Commissioners were authorized and empowered to enter into treaties with them upon the basis of certain conditions, among which especially that—

“Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.”

Following this were provisions for the abolition of slavery and the prohibition of involuntary servitude, save as a punishment for crime, etc. (See Ind. Office Rep., 1865, p. 34, *et seq.*)

This commission, consisting of D. N. Cooley, Hon. Elijah Sells, Thos. Weston, a leading member of the Society of Friends, Gen. W. S. Harney, and Col. E. S. Parker, of Gen. Grant's staff, was sent to these civilized tribes to negotiate general propositions upon which uniform treaties might be based, the central idea of which was *political organization, equal civil and political rights, a uniform administration* of government. The great stumbling block to these negotiations was found to be the bitter internal feuds, resulting from the war, and

which it seemed nearly impossible to assuage. Conference after conference was held at Fort Smith, Ark., and at Washington, to which place the several tribes sent delegates, and draft after draft of treaties was made in the futile attempt to settle these questions, but through all there appears to have been no questions raised as to the sharing of the vast Cherokee possessions with any people sought to be affiliated with them, except upon the basis of 160 acres *per capita*, to such people, upon payment of a price to be agreed upon. This provoked no opposition, as the proposition was agreeable to the Cherokees; but had the proposition been that these people, in addition to the lands so purchased, should become equal owners of all the immense possessions of the Cherokees, it is folly to presume that this question, going directly to their financial interests to such an extent, would not have awakened their quick and earnest protest.

The negotiations begun at Fort Smith were broken off, but resumed at Washington, where delegates from the various tribes had been sent, and a new set of propositions was submitted, among which were:

1st. The proper and just method of adjusting affairs between the loyal and disloyal. (This point applied especially to the Cherokees, where confiscation laws, passed by the National Council, had taken effect upon the property of those who were disloyal.)

2d. The proper relations which Freedman should thereafter hold toward the remainder of the people.

3d. A fair compensation for losses of property occasioned to those who remained loyal by the disloyal party.

4th. Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it was in contemplation to remove from Kansas. (Annual Rp. Com. Ind. Aff's., 1866, p. 8.)

More difficulty was experienced in arriving at the consummation of a treaty with the Cherokees than with

any of the other tribes or Nations, owing to the trouble and animosity existing between the two factions of that Nation, and the question as to what provision should be made for the Freedmen.

Subsequently, and after negotiations to which it is needless to more particularly refer, the treaty of July 19, referred to herein, was entered into.

The second article of this treaty provides for general amnesty between the United States and the Cherokee Nation. The third for the restoration of property or payment of the value thereto, therefore confiscated, and the repeal of all confiscation laws of said nation, against the property of Cherokees who had been identified with the Southern cause.

Articles 4, 5, 6, 7, 8, and 9 are devoted to the regulation of the internal affairs of said nation, and especially to securing to the freedmen and affiliated peoples *equal political and civil rights and equal participation in domestic affairs and the administration of justice*. The following six articles (to article fifteen) are devoted to the details of the organization of the general Indian government.

Thus it will be seen that the whole trend and purpose of the treaties of 1866 were in the interest of securing harmonious political relations among the various factions and elements of these people.

It is in view of all these circumstances and this state of feeling and uniform purpose of the Congress of the United States to suppress factional discord and establish throughout the land, and especially in the Southern country where slavery had formerly existed, equal civil and political rights and powers, that we must consider and construe the acts, treaties, and contracts involved in this case.

(For an elaborate and comprehensive history of these transactions, see An. Rep. Comr. Indian Affairs, 1865, page 34, *et seq.*)

**The Intendment of the Agreement as shown by
its Language and by the Language of the
Delaware and Cherokee Treaties.**

It will be observed that under the provisions of article four of the Delaware treaty of 1866, only an absolute purchase of lands could be made for their future homes—160 acres for each person—man, woman, or child. It will be further observed that, under the provisions of article fifteen of the Cherokee treaty of 1866, a tribe retaining its tribal relation could be settled in the Cherokee country only upon lands east of the 96°, and there only upon the condition that payment be made at an agreed price *for a specific quantity of land*—160 acres for each man, woman, and child—and a compliance on the part of the tribe so settled, with the other requirements of that article. The Cherokees had been careful to stipulate, all the way along, that Indians to be settled in their country should be limited to an amount of land equal to 160 acres for each person.

It will be further observed that by the agreement between the Cherokees and the Delawares, an absolute purchase at \$1 per acre was made of a specific amount of land: 160 acres for each man, woman, and child of the Delawares. As shown by the report of the Indian Office there were 985 Delawares, requiring, at 160 acres each, 157,600 acres, which, at the agreed price, amounted to \$157,600, which was exactly the amount paid to the Cherokees in accordance with the terms and provisions of the fourth article of the Delaware treaty of 1866, and the fifteenth article of the Cherokee treaty of 1866.

It will be further observed, by reference to said agreement that, in addition to the purchase of lands as aforesaid, the Delawares agreed to contribute a certain amount to the Cherokee national fund, in consideration of enjoying "equal rights" with "native Cherokees."

By this part of the agreement, the Delawares were to pay a definite and limited sum stated, which should bear a given ratio to a definite and fixed amount of the Cherokee fund, viz., national fund (cash invested), \$678,000, and proceeds of neutral lands in Kansas (estimated), \$1,000,000. Against this the Delawares agreed to put in an amount which should bear the same relation to \$1,678,000 that the number of Delawares incorporated should be found to bear to the number of Cherokees, which was subsequently found to be in the proportion of 1 to 13.78, and they consequently paid into the common fund \$121,824.28. (Record, page —.)

It will be further observed that, in making up this partnership fund, the vast possessions of the Cherokees west of the 96° and the lands known as the "strip lands" in Kansas, ceded by the seventeenth article of the treaty of 1866, were not in any way mentioned or included, or estimated for in determining the amount of the Cherokee national fund.

That the Delawares at the time of entering into this agreement had no thought of acquiring any interest in any lands other than those specifically mentioned in the agreement is abundantly evident and apparent in almost every line of the instrument itself.

The language of the agreement is a limitation so strict that it cannot be misunderstood; a limitation is clearly declared both as to amount and as to location. Mark how carefully these limitations are expressed:

"The Cherokees * * * agree to sell to the Delawares * * * a quantity of land *east of the 96°*, in the aggregate equal to *one hundred and sixty acres for each individual*, * * * and the selections by the Delawares may be made in any part of the reservation *east of said line of 96°*," etc.

What language could be clearer than this? These new members of the Cherokee political family are to

have a home, but the limits of it are strictly defined, so that there can be no mistake. They are to have 160 acres for each person, regardless of sex or age, no more, no less, and they are told that it must be taken east of 96°, as the lands lying west of that line are not in the transaction. In further emphasis of the fact that this is a specific purchase of a limited and definite amount of land, it will be noticed that the Delawares are careful to secure themselves against the possible contingency that the Cherokee home reservation east of 96° may some day be allotted in severalty, and, for fear there may not be sufficient therein to allow 160 acres to each, they are careful to provide that in such a contingency—

“One hundred and sixty acres for each individual shall be guaranteed to the Delawares incorporated by these articles,” etc. (See the Cherokee-Delaware agreement.)

This precaution alone deprives this transaction of all semblance of the essential features of mutuality contended for by appellees and stamps it as a simple purchase of quantity in place.

Article fifteen of the treaty of 1866, under authority of which the agreement in question was made, is peculiar. It proposes two plans by which friendly Indians may incorporate with the Cherokees. Let us examine them more closely.

The first part of this article provides that, “should any such tribe or band of Indians, settling in said country, abandon their tribal organization,” they should be required *only* to pay into the Cherokee treasury a sum of money bearing the same proportion to the national fund as their numbers to the number of Cherokees; but, should such tribe elect to maintain a tribal organization distinct from the Cherokees, then, in addition to the foregoing, they should also pay the Cherokees an agreed

sum for the purchase of 160 acres for each individual incorporated, and should have set apart for them, east of 96°, etc., the amount of lands so purchased.

This proposition, when carefully analyzed, becomes too plain to admit of controversy. At this time the Cherokees had a considerable national fund, which was either invested or held by the Government in trust in lieu of investment, the entire proceeds of which were annually expended in the administration of the Cherokee government, the support of public schools, seminaries, asylums, and the various public institutions there existing, and in the benefits of which such affiliating Indians would become participants to the same extent as native Cherokees. It was therefore provided, in accordance with the plainest principles of justice and fair dealing, that they should contribute an amount to such fund as would maintain its relation to the increased population and not impair or diminish its usefulness or strength. The contribution provided to the national fund was for this purpose, and for this only, and did not and could not contemplate a purchase of any interest in the vast territory of the Cherokee people. Its complete inadequacy for any such purpose is of itself sufficient evidence that no such purpose was contemplated. In fact, as such payment was only to equalize the national fund, which was used wholly for the purpose of carrying on the government, and independent of, and not connected with, any question of property, there would be absolutely no vestige of consideration passing from the Delawares to Cherokees for an interest in these lands, which were and are worth many times the combined value of all the assets mentioned and referred to in the Delaware purchase.

Indians incorporating under the first plan were simply to mingle with the Cherokees on equal civil and political terms, participating in the benefits and protection of

Cherokee laws and administration of justice, with equal advantages of schools, asylums, and institutions supported from the interest of Cherokee funds; and were by such contribution to pay their due proportion of the cost of the administration of the Cherokee government, and that was to be the end of it. In other words, the increase in numbers would increase governmental expenses by just the amount they were paying in, and thus they were simply paying the increase of expenditure their own presence was to occasion, and they could locate upon and *use* any part of the Cherokee domain, without acquiring any title (except to the improvements) just as native Cherokees do to this day. But in case they should elect to maintain some form of tribal organization, which would, in the nature of things, in a measure segregate them from the body of the Cherokee Nation and require their location upon specific property, which they were to *own*, the further provision was made, as a matter of justice to the Cherokee Nation, that lands so exclusively occupied should be paid for at a price to be agreed upon between the contracting parties.

As already herein stated, the fact that this purchase of land contemplated and reached only the specific limit nominated in the instrument itself is apparent everywhere upon the face of the agreement, and is the only conclusion that comports with all the circumstances surrounding the transaction as a whole, and which does not make necessary a strained, forced, unnatural, and illogical interpretation.

The Gross Inadequacy of the Consideration.

The lands "ceded" by the treaty under discussion were the Kansas "strip" and "neutral" lands mentioned in the seventeenth article thereof, and those "authorized to be ceded or sold" were the lands lying west of the 96° and mentioned in the sixteenth article of said

treaty, the latter being the lands from which the funds were received on account of grazing privileges and which form the nominal basis of this suit.

As stated, at the time this agreement was entered into, the Cherokee Nation was possessed of the following lands:

	Acres.
"Strip" lands in Kansas	400,000
"Neutral" lands in Kansas	1,000,000
Lands west of 96° in the Indian Territory (about)	8,000,000
Lands east of 96° in the Indian Territory (about)	5,000,000

These lands, estimated at the nominal value of \$1.25 per acre, except the neutral lands, which we will value at \$1,000,000, as stipulated in the agreement, were worth at the date of said agreement, \$17,750,000; now add invested funds, \$678,000, and we have the total wealth of the Cherokees, \$18,428,000.

This estimated value is the minimum price of public lands, and the price at which the strip lands were afterwards sold—these values are really only nominal. The actual values, if the Cherokees had been permitted to handle their own lands, would have been many times greater.

At this time the population of the Cherokee Nation was about 13,000, making a *per capita* wealth upon this extremely low estimate of \$1,416 for men, women, and children. Now, as stated, the Delawares incorporated under this agreement numbered 985, and they paid to the Cherokees for land \$157,600, and to the national fund \$121,824.28, making a total of \$279,424.28, a *per capita* sum of \$283.68.

In other words, we are asked to believe that these shrewd Cherokees, with a *per capita* wealth of \$1,416,

were willing to take into their fold, in full participation in all their possessions, 985 Delawares, bringing with them a *per capita* payment of but \$283.68, thereby decreasing the *per capita* wealth of the Cherokees—men, woman, and children—nearly \$100, and increasing the *per capita* wealth of the Delawares nearly \$1,100! Yet this is the construction the court is asked to put upon this agreement, and that, too, in the face of and against its plain letter and more reasonable construction.

But this is not all. This contract distinctly states:

“And, that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is \$678,000.

“And the Delawares further agree that in calculating the total amount of said national fund there shall be added to the said sum of \$678,000 the sum of \$1,000,000, being the estimated value of the *Cherokee neutral lands in Kansas*, thus making the whole Cherokee national fund \$1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.”

Now the “strip” lands in Kansas were disposed of under the identical article of the same treaty as these “neutral” lands. There were also some 8,000,000 acres of lands lying west of 96° authorized by the same treaty “to be ceded or sold;” yet these are not mentioned and are not spoken of as elements in determining the “basis for calculating the amount which the Delawares are to pay into the common fund.” It can not be said they were overlooked or left out of the count because of unimportance, for they constituted more than half the entire wealth of the Cherokee Nation. The conclusion is inevitable that they were omitted *by intention*. The Chero-

kees were not selling an interest in them and the Delawares were not buying such an interest. It was more than sixteen years after this time before the Delawares conceived the idea of making this extravagant claim, and it was suggested by the distribution of \$300,000 to Cherokees by blood, which sum had been appropriated on account of lands west of the 96° by act of Congress of March 3, 1883. (22 Stat., 624.)

There is no more familiar maxim of law than *expressio unius est exclusio alterius*, the expression of one is the exclusion of others. The agreement in question, in order "that there may be *no doubt hereafter*" as to the amount of Cherokee resources *to be affected by it*, specifically enumerated just what should be included. In the expression of these, by a rule of construction as old as jurisprudence itself, and sanctioned by centuries of judicial recognition and approval all over the world, all else was and is excluded as completely and absolutely as if such exclusion had been expressed in terms the most positive and emphatic. Thus is this most unreasonable contention that an entire community of interest existed between those parties, equally unsustained by the plain letter of the instrument itself and the necessary and well established rules of interpretation.

But even this is not all. We are told that under this agreement there was to be complete mutuality and that all possessions of the Cherokees were to be shared with their brothers, the Delawares, without any reservations, and this, notwithstanding the fact that they had paid but about one-seventh of the amount ratably due on an estimate far below actual value. This would seem unfair enough, but it is the least unconscionable part of it. While the Delawares were thus demanding so much for so little in this "mutual" compact, it appears from the report of the Indian Office (Record, page—) that they were holding back as private and personal funds from the

Cherokees nearly a million of cash assets (\$889,191.04) the annual interest of which they were then receiving and distributing to the *Delawares by blood only*, and continued so to receive and distribute for twenty-five years thereafter, to the exclusion of their generous Cherokee brothers, whom the Delawares are insisting shall not be permitted to enjoy any *exclusive* benefits. They here and now declare that all of the Cherokee possessions and income must enrich the "mutual" coffers, to which the Cherokees have already contributed 700 per cent. more than these foster brothers.

It will occur to the most casual with irresistible force that the mere suggestion of the fact that these Delawares themselves held out from the common treasury every cent of their tribal funds not mentioned in said agreement, and required by its terms to be paid, falsifies the whole structure, purpose, and character of appellee's case.

Let us, then, briefly consider just what the Delawares sought by this agreement, what they paid for, and what they got. They had sold their lands in Kansas and wanted a home in the South. The Government of the United States had agreed to secure them such a home. And to what extent? An undivided interest in some fourteen million acres of land? Surely not. The Delaware treaty speaks for itself. By the fourth article thereof, the United States was to provide them homes in the Indian country, south of Kansas—"a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove," etc., to be paid for out of the proceeds of the sales of the Delaware lands in Kansas. To accomplish this was the obligation assumed by the United States. To accomplish this was the object and purpose of the Delawares themselves, and they expected nothing more. But, in order to secure them a safe home, with the advantages of good government,

schools, churches, asylums, seminaries, etc., together with protection of life and property and equal participation in the administration of public affairs, the government arranged that they should pay into the Cherokee fund an amount of money bearing the same relation to the Cherokee national fund, *then existing*, that their numbers did to the whole number of Cherokees. As this national fund was simply and solely an administration fund, and its proceeds used for no other purpose, there was no hardship in that. The \$1,000,000 coming from the "neutral" lands was added, for the reason that the proceeds of those lands were to be placed in this same general administration fund as soon as received, and, in fact, were so placed. The other properties of the Cherokees were *not mentioned*, because it was *not contemplated* that the proceeds of any of them would ever be added to this fund, but as a matter of fact a large part of the proceeds of the "strip" lands was added, and the benefits of it have since been enjoyed by these Delawares equally with the Cherokees, without the payment of a cent in consideration therefor. The Delawares did not put all their funds into the common till, for the reason that they had paid all their purchase had called for; but, when the common fund was swelled beyond the limits contemplated in the agreement, they ought in good conscience and common fairness to have put in their proportion, out of the abundant means they were holding back and enjoying as exclusive Delaware funds.

They had not been required to pay in a larger amount, because they were then seeking to provide for the payment of *their share* of the *public expense*. The existing Cherokee fund was supporting the existing government, and their numbers would increase expenses by just the amount to be realized from the investment of the *equalizing* funds paid in by them.

The fact is too evident to admit of argument that these Delawares, after purchasing the exact quantum of land contemplated in all these treaties and in the agreement stipulated, contributed a given amount to the national fund, to be used in the general administration of the government, to secure to them equal civil and political rights and participation in public affairs, and that, beyond and besides this common fund thus created, *both parties* had and possessed, and have ever since continued to possess, separate funds, in and to which the other has had no right, claim or interest.

Within the last three years, and since the agitation of the unreasonable claim set up in this suit, these same Delawares have caused the entire balance of their separate funds amounting to nearly \$900,000 to be paid out *per capita* to Delawares only. (26 Stat., 1011.)

If our contention herein could by any interpretation be held to be not correct, still this plaintiff would be in no better plight, and this fact further establishes the soundness of our position beyond a peradventure; for if the Delawares are to claim an interest in all this Cherokee domain, then they ought to have contributed in that proportion, thereby bearing the burdens while enjoying the benefits. They have not, by their conduct, viewed in this spirit, fulfilled the requirements of article fifteen of the treaty of 1866, which distinctly provides that—

“The said tribes, thus settled, *shall also pay into the national fund a sum of money* to be agreed on by the respective parties, not greater in proportion to the whole existing national fund *and the probable proceeds of the lands herein ceded or authorized to be ceded or sold* than their numbers bear to the whole number of Cherokees then residing in said country and thenceafterwards they shall enjoy all the rights of native Cherokees.”

The lands “ceded” by the treaty were the Kansas “strip” and “neutral” lands mentioned in the seven-

teenth article thereof, and those "authorized to be ceded or sold" are the lands lying west of the 96° and mentioned in the sixteenth article of said treaty. Has the above-quoted provision of the treaty been carried out? Most certainly not! Even the not-over-sensitive Delawares have not the temerity to make such a claim, and the agreement does not even hint at it. As stated before, they were not attempting to purchase so much as this, and the Cherokees were not undertaking to sell. This agreement was simply carrying into effect a *portion* of the powers granted by said article fifteen, and the extent to which such powers were being exercised and of the rights and benefits purchased by said Delawares was clearly and plainly set out and expressed in said agreement. In other words, our contention is that the Cherokees and Delawares, by their contract of April 8, 1867, did not *intend* to exercise *all* the powers contemplated in section fifteen of the treaty of 1866 (14 Stat., 803), which provided for the payment to the Cherokees of an amount "sustaining the same relation," to the then existing Cherokee national fund "*and the probable proceeds of the lands herein ceded or authorized to be ceded or sold, as the number,*" etc.

As stated, the lands "ceded" by that treaty were the "neutral" and "strip" lands in Kansas, and the lands "authorized to be ceded or sold" were the lands west of 96° in the Territory, known as the "outlet lands," thus including *all* the Cherokee domain except the "home reservation" consisting of the lands east of 96°.

When the two parties came together for the purpose of entering into this agreement, for reasons obvious in the record, the Delawares concluded to purchase *only* an interest in the Cherokee national fund as it then existed, and the probable proceeds of the "neutral lands," leaving the "strip" lands, the land west of 96° and the home reservation, except the 157,600 acres specified in

the agreement, out of the count. As already shown, to have purchased an equal interest in *all* the domain of the Cherokees, including the lands west of 96°, on the basis of the price agreed upon for the neutral lands, and that actually realized in the sale of the strip lands (\$1.25 per acre) *would have vastly exceeded the amount of funds possessed by the Delawares*, and would have rendered any trade between them impossible.

The "neutral" lands constituted but a comparatively insignificant part of the possessions of the Cherokee Nation. It is unreasonable to contend that in a transaction of this importance either party would be content to provide *specifically* and *directly* for only a comparatively small element in the consideration, and leave all the balance of the vast domain of the nation to pass by simple *inference*. Such a contention is far-fetched, strained, illogical, and unreasonable. The fact is, the Delawares purchased as much of the benefits that the Cherokees were authorized to sell, under the treaty of '66, as they had contemplated purchasing under their own treaty. To have gone further and purchased an interest in the Cherokee lands "authorized to be ceded or sold," *i. e.*, the lands west of 96°, would have been beyond their power for want of funds. Hence they purchased what they could pay for, and that there might be no mistake or misunderstanding as to what that was, it was distinctly nominated in the agreement.

Why should the Delaware have the *exclusive* right to the 157,600 acres of land, and *equal* rights with the native Cherokee in all the rest of the land? Has he paid for any such rights? The value of these lands reached many millions. If the Delawares were to have been really endowed with all these privileges, it is quite probable that the agreement would have been worded something like this:

"And in addition to the 157,600 acres thus sold to the Delawares for their occupancy, they shall share equally with the native Cherokees in the general possessions of the Cherokee people. That in addition to sharing in the \$1,678,000 national fund of the Cherokee Nation, which 'there may be no doubt' about hereafter, the Delawares, while enjoying \$889,191.04 exclusively of their own funds, shall be entitled, without contributing further to the Cherokee national fund, to any and all augmentations thereof. And it is further agreed and understood by and between the parties that the Cherokee Nation shall augment said fund by all available moneys from leases or sales of its lands wheresoever situated and leased or sold.

"And as a further right secured to the Delawares by this agreement, they shall have a common interest in all invested funds of the Cherokee Nation, and all funds held in trust by the United States, without being required to allow the Cherokee people to share in any funds of the Delawares, held by the United States for their benefit."

But such provisions are conspicuously absent. It never was intended that such matters should be included by implication. There was no reason why such things should be named. The Delawares had the best end of the bargain as it was. Good conscience does not require that the great advantage gained by them in their arrangement with the Cherokees should be extended to other things not thought of—not mentioned at the time the bargain was made—but rather a more strict adherence to the plain intendment of the contract.

The contract of incorporation is not couched in ambiguous terms. It plainly says that the Delawares shall have the right to occupy the 157,600 acres of land they bought; that they shall have an interest in the national fund of \$1,678,000; that they should in addition to this

have and enjoy all the rights of the native Cherokee—*i. e.*, civil, political and personal. Those rights so persistently contended for by the Government, and which had become a pivotal consideration in all the treaties and agreements of the period.

This is certainly enough. They ought not to complain. The contract of incorporation does not include the remainder of the lands of the Cherokee people. It does not include the rents and profits thereof. It therefore cannot include the \$593,625 received on account of the grazing privileges from the Cherokee Strip Live Stock Association. It includes no part of the \$300,000 appropriated by the act of June 16, 1880. It does not include the \$1,099,137.41 held in trust for the Cherokee Nation by the United States on account of sales of land to the Osages. Neither does it include any other trust funds thus held, and more important than all, it does not include any portion of the \$8,595,674.12 for which these lands west of the 96° have recently been sold to the United States.

The amount, \$121,824.28, paid by the Delawares to equalize (maintain) the national fund, was not paid to the Cherokees, but transferred to their credit as an invested fund or held in trust in lieu of investment by the United States, that, as already stated, the interest derived from it might pay the proportion of the public expenses occasioned by their presence in the country. Only that and nothing more. That money has ever since remained in the hands of the United States as a permanent investment, and the interest upon it has been paid semi-annually and used toward the support of the general Cherokee government.

The present national fund of the Cherokees is \$2,636,634.13 (Record, page —), all of which is held by the United States as a specific trust. The interest at 5 per cent. per annum, is paid semi-annually, and by the terms

of the treaty of 1866 (Art. 23, 14, Stat. 805), is distributed into separate funds, and devoted to the maintenance of the various branches of the Cherokee government and public institutions. No part of this fund can be diverted to any other use except by the joint consent of the Cherokee Nation and the Congress of the United States; and should the Cherokee Nation be dissolved and its funds capitalized and paid out *per capita* to its citizens, these Delawares would receive back every cent of the amount so paid into said fund by them, and this without reference to proceeds of the "strip" or "outlet" lands. The growing population and increased demands have required a corresponding increase of national (invested) funds. The consolidated fund under the agreement was \$1,799,824.00. There seemed to be no machinery for compelling the Delawares to supply their proportion of increasing demands, and the Cherokees have alone increased said fund to \$2,636,634.00, from their private resources (*i. e.*, sales and leases of land), without any aid from the Delawares, although they have received their proportion of the benefits. It would seem the more gratuities they receive, the more exorbitant become their demands.

In the argument of the case below, and in the opinion of the court below, much stress was and is laid upon the change in the Cherokee constitution by the adoption of an amendment November 29, 1866.

This amendment to article three of the constitution, including the affiliating Indians in the term "citizen," is the concluding portion of the identical *paragraph* which defines eligibility to office, thus emphasizing the fact that the Cherokees all the time had *political* equality in mind with reference to these people, and *not* property rights, and is in perfect harmony with our interpretation of this agreement. In that amendment (section 5) they say: "No person shall be eligible to a seat in the national

council but a male *citizen*," and the paragraph concludes: "All native born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen * * * shall be taken and deemed to be citizens of the Cherokee Nation." There is no possibility of mistaking the intention of this amendment. These two provisions are in the same section and not even separated by a *paragraph*. It provides that citizens may have certain rights, and then in order that its agreement to admit these other classes upon equal terms *in the government* may not fail, it goes on and extends the term "citizen" over them, unquestionably for the purpose already in the paragraph mentioned, which is, that they may be eligible to a seat in the council, equally with a native. That is the only subject under treatment. There is not a word in this whole amendment, consisting of seven sections, that in any way touches, directly or indirectly, the subject of property. It is wholly and solely upon the subject of the organization and administration of the civil government.

The only conclusion that can, with any show of reasonableness, be drawn from the adoption of this amendment, is that the Cherokees were endeavoring to make good their promise to endow these affiliated people with equal civil and political rights.

Much stress has also been laid upon the fact that in 1880, \$300,000 was received by the Cherokee Nation from the United States on the general account of lands west of 96°, and paid out by order of the National Council to all citizens of the nation, including the Delawares, thus admitting, as it is claimed, the rights of the latter to participation.

In that year there was a famine in the Indian Territory. Two failures of crops had reduced the people almost to starvation. In this emergency the nation asked the United States to advance it \$500,000 to re-

lieve distress, the amount to be charged to the general account of lands west of 96°. Congress, by act approved June 16, 1880 (21 Stat. 248) appropriated \$300,000, which was paid to the Cherokee Nation, and by its council appropriated by an act entitled "An Act to Provide *Bread-stuffs* for the Cherokee People." That this was simply an act of humanity, in a time of common and extreme need is too apparent to need argument. To have stopped to discriminate as to who might be, by blood, entitled to this *bread-money*, at such a time, would have been inhuman.

The language of the act of Congress making this appropriation is sufficiently clear as to its purpose:

"That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the treasury of the Cherokee Nation, out of the funds due said nation, for its lands in the Indian Territory west of the Arkansas River, as per estimates of the Secretary of the Interior, and which sum shall be expended, as the acts of the Cherokee Legislature direct, to relieve the destitution of the Cherokee people, caused by the failure of the crops during the past season by reason of the drought; this amount to be immediately available."

But there are two very remarkable things about this piece of history that make the calling of it as a witness by the appellees a most unfortunate circumstance. First, the language of the act of the Cherokee Council providing for the distribution of this money is significant: "That the funds obtained under the provisions of this act shall be paid out, *per capita*, to the whole people of the Cherokee Nation on the census roll of the census of the Cherokee Nation to be taken in 1880, as provided for in section three of the amendment of article three of the constitution."

If these Delawares, Shawnees, and freedmen were *entitled* to receive the benefit of the proceeds of these lands

of right, and such right was admitted, and if this act was a recognition of such right, then what necessity existed for such strained particularity in providing that this bread-money should be distributed "to the whole people of the Cherokee Nation," as shown by the census roll of the census to be taken under the amendment to the third article of the constitution?

The basic principles of the interpretation of statutes must be applied even to the somewhat primitive legislation of these people, and there is no more familiar rule than that all statutes must, if possible, be so construed as to give force, meaning and *purpose* to every provision; and this language proves, if it proves anything, that it was deemed necessary to thus specify that no one within the Cherokee Nation should be excluded from the benefits of this charity, in order to bring these affiliated peoples within its operation. So that the very language of this act contradicts the proposition that it is invoked to sustain.

But this is not the most singular part of it. This act is dwelt upon as constituting an admission of the claim of appellees because they were equally *included* in its benefits, and at the same time these people, who cannot be charged with too great modesty in the matter of reaching for about everything in sight, ask for a judgment for an amount equal to their pro rata share of this same three hundred thousand dollars, on the ground that they were *excluded* from its benefits by the Cherokee Nation! (See Count 5, of petition, record, page .)

There is another proposition which presents itself forcibly to this discussion, and that is:

The Absolute Right of Self-Government in the Cherokees.

That the Cherokees possess the sole and exclusive right to manage their own internal affairs and of control of the persons and property of their citizens, there has been no question for more than half a century, and this right has been recognized by the government of the United States, by an unbroken current of precedents through all this time.

The object of the Cherokee treaty of 1835 (7 Stat., 478) as recited in the preamble thereto, was to reunite their people in one body and secure a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the state sovereignties, and where they could establish and enjoy a government of their choice and perpetuate such a state of society as might be most consonant with their views, habits and conditions, and might tend to their individual comfort and advancement in civilization.

Article five of the treaty provides:

“But they (the United States) shall secure to the Cherokee Nation the right by their National Councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their people or such persons as have connected themselves with them.”

By article thirteen of the treaty of 1866, it was agreed that the United States might establish courts in the Indian Territory, with the proviso however:

“That the judicial tribunals of the (Cherokees) Nation shall be allowed to retain *exclusive* jurisdiction in all civil and criminal cases arising within their (the Chero-

kees) country, in which members of the nation, by nativity or adoption, shall be the only parties, or when the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." (14 Stat., 803.)

The Court of Claims in speaking of the government of the Cherokee Nation says:

"It has its territorial possessions and boundaries, its constitution (very much like the constitution of the United States) its laws, its executive, legislative and judicial departments, with none of which can any state or the United States interfere." (20th Ct. of Claims, 449.)

The fact is that for more than a half century the right has been recognized in the Cherokee Nation to make such laws for the government of persons and property within its jurisdiction, and to make such disposition of its public funds as it may see fit. That right has never been questioned, but, on the other hand, has been sanctioned by the executive departments of the government, and the principle recognized by the Supreme Court of the United States. (5 Peters, 1; 6 Pet., 515; 18 Howard, 100; 20 Court of Claims, 449; 117 U. S., 288.)

The Secretary of the Interior (Mr. Teller) in speaking of the right of the Cherokee Nation to control and dispose of its property in such manner as it may see fit, in a letter to the President *pro tempore* of the Senate, dated January 13, 1885, says:

"The rights reserved to the United States are clearly expressed in the several treaties, and the right of the United States to control the Cherokee property and prevent the nation from having the *full and absolute* control of the product of these lands is not even suggested."

On the contrary, the government guarantees, in article twenty-six, as follows:

"The United States guarantee to the people of the Cherokee Nation the quiet and peaceable enjoyment of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done."

The Department has not considered it the duty of the Commissioner of Indian Affairs or the Secretary of the Interior to interfere with the affairs of the Cherokee Nation, except in the case expressly provided by treaty with that nation. (See Senate Ex. Doc. 17, 48th Cong., 2d Sess., page 6, and approvingly referred to by the Court of Claims in the case of the Eastern Band of Cherokees *vs.* The United States and the Cherokee Nation, 20 Court of Claims, 449.)

The Cherokee Nation has a right to stand upon its contracts and its treaties, and no acts of Congress and no proceedings of the political departments of the government can take away its vested rights guaranteed by such treaties (20 Court of Claims, 481) and confirmed by this court. (117 U. S., 288, hereinbefore referred to.)

This rule was applied in the same decision to the funds received by the Cherokee Nation on account of the sale of a portion of its lands by article seventeen of the treaty of 1866.

This same principle was recognized by the legislative branch of the government by an item in the Indian appropriation bill of March 3, 1875, which provides:

“* * * and the United States assistant treasurer at St. Louis, Missouri, be, and he hereby is, authorized to open and keep accounts with the duly constituted treasurer of the Cherokee, Creek and Choctaw and Chickasaw Nations of Indians, the same as with the government agents and disbursing officers.” (18 Stat., 448.)

Under this provision of the law the funds of the Cherokee Nation, due from the government, are placed with the assistant treasurer at St. Louis and are drawn therefrom by the treasurer of the Cherokee Nation and disposed of by him as the acts of the Cherokee National Council may direct. Again, the appropriations made by the act of June 16, 1880 (21 Stat., 228) and March 3, 1883 (22 Stat., 624) were both made “to be expended as the acts of the Cherokee legislature direct.”

Upon this point, and to further illustrate it, we invite attention to an item in the Indian appropriation act of March 3, 1891, making appropriation to pay the Choctaw and Chickasaw Indians for certain lands in the Indian Territory (26 Stat., 1025) and the action taken thereon.

Under date of April 11th, 1891, the Council of the Choctaw Nation passed an act entitled,

“An act authorizing distribution *per capita* of the money due to the Choctaw Nation for the sale of a portion of the leased district under act of Congress, approved March 3, 1891.”

The first section reads as follows:

“Section 1. Be it enacted by the General Council of the Choctaw Nation assembled, that the sum of one million, six hundred and fifty-seven thousand, six hundred and ninety-one dollars, being the balance after deducting the delegate's per cent., and twenty-five thousand and five dollars, for necessary expenses in procuring and distributing the same, shall be paid out *per capita* among the Choctaw citizens *by blood* residing in the Choctaw and Chickasaw Nations at the date of this act.”

This act excluded from sharing in the distribution of that fund all persons who are recognized as members of the Nation by virtue of the thirty-eighth article of the Choctaw and Chickasaw treaty of 1866 (14 Stat., 779), whose status is fixed by the twenty-sixth article of that treaty. This matter having been submitted to the Attorney General, he rendered his opinion thereon in a letter to the Secretary of the Interior, under date of July 28, 1891, as follows:

“DEPARTMENT OF JUSTICE,

“WASHINGTON, D. C., *July 28, 1891.*

“SIR: The Commissioner of Indian Affairs left at this department a few days since an opinion prepared by Mr. Assistant Attorney General Shields, touching the question of the rule of individual distribution among the Choctaw and Chickasaw Indians of the appropriations made by last Congress (26 Statutes at Large, 1025), with an oral request for an opinion from this Department touching that subject matter.

“The act of Congress, after making the appropriation, provides:

“‘That three-fourths of this appropriation be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times, and in such sums, as directed and required by the legislative authority of said Chickasaw Nation.’

“This language plainly has reference to the payment of these moneys in bulk to the representatives of the Choctaw and Chickasaw Nations and imposes no duty upon the Secretary of the Interior with reference to the individual distribution of the same. The persons entitled to such distribution, the evidence necessary to establish their claims, and the manner of such distribution are all matters to be regulated by the laws of the

Chocktaw and Chickasaw Nations, respectively, subject, doubtless, to the rule that such laws must not be in conflict with the constitution and laws of the United States.

"It is not apparent, therefore, that any question is presented to the honorable Secretary of the Interior for decision requiring an opinion from the Attorney General under section 356 of the Revised Statutes. *Any decision by the Secretary or opinion by the Attorney General as to who are the proper distributees of this fund would be wholly inconclusive and, as I conceive, outside of duties imposed by law, scarcely less so than if we should attempt to determine what should be done with the moneys paid to the several states under the act providing for the refunding of direct taxes or fix the rule for the distribution of descendents' estates in one of the Territories.*

"At any rate this request contains no statement of facts and formulates no question of law for my consideration.

"Under the circumstances, therefore, the papers are returned without the opinion asked.

"Very respectfully,

"W. H. H. MILLER,

"Attorney General.

"The SECRETARY OF THE INTERIOR."

This case is identical in principle with the one under consideration, and the opinion of the Attorney General fully sustains the position for which we contend. The moneys being disposed of were moneys arising out of the "public lands of the Chocktaws and Chickasaws," and the persons asking to share were citizens adopted under the Chocktaw and Chickasaw treaty of 1866, the sister treaty to the Cherokee treaty of the same year.

So, if we admit for the sake of argument that the Delawares, under the agreement in question, have an interest in all the common property of the Cherokee Nation, that nation, under the decisions of the Court of Claims and this court, the opinion of the Attorney Gen-

eral and Secretary of the Interior, has a perfect right to make such disposition of its lands and moneys as it may see fit and proper, whether effecting members by blood or adoption, and there is no right or power vested or reserved in the United States to interfere. As a matter of fact, if we apply the principles laid down by the courts, the Attorney General and the Secretary of the Interior, which recognize the absolute unrestricted right of self-government in the Cherokee Nation as to its internal affairs, and the right guaranteed to that Nation "to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their own people or such persons as have connected themselves with them," then the United States Government has no more control over the public property of that nation or the action of its legislature in connection therewith, than it has over the public property or legislative acts of a state or territory.

The relation of the United States to the funds now in the treasury belonging to the Cherokee Nation is simply that of trustee, but as to funds that they may come into possession of that nation, and not thus held, the disposition thereof is a matter over which the United States have no control whatever, either as trustee or otherwise.

Recurring to the original proposition with which this argument began, we call the attention of the court to the significant parity of expression between the fourteenth amendment to the federal constitution, and the clauses of the agreement in question.

The fourteenth amendment to the constitution provides that "no State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States," etc.

The Cherokee-Delaware agreement provides that the Delawares shall be admitted with "the same rights and immunities," etc. Almost the identical language of the fourteenth amendment to the constitution of the United States, which was at that time pending before the legislatures of the several States of the Union.

In the case of *Strander vs. West Virginia* (100 U. S., 303) speaking of the fourteenth amendment, the court say:

"This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated * * * all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as are said in the slaughter-house cases (16 Wall., 36), cannot be understood without keeping in view the history of the times when they were adopted and the general objects they plainly sought to accomplish. * * * It was designed to assure to the colored race the enjoyment of all the civil rights, that under the law are enjoyed by white persons, and to give to that race the protection of the general government. * * * The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms. * * * Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is immunity from inequality of legal protection," etc.

It seems too plain for serious controversy, that by the use of the expressions in the treaties and contract under consideration, the same purpose was in mind, the same object aimed at and the same mischief sought to be remedied, as in behalf of the liberated slaves by the thirteenth, fourteenth and fifteenth amendments to the federal constitution, and the civil rights act.

To multiply illustrations tending to show the thought purpose and intent running through the various treaties with the five civilized tribes in 1866, and the agree-

ments growing out of them, would be to expand this brief far beyond the limits of both necessity and propriety. It will hardly be contended, we should think, that the government intended to inflict upon these Indian tribes any greater punishment for having permitted the institution of slavery in their midst than it did upon the more highly civilized people of the southern states who were responsible for it, and who set the example. Yet we find the ninth article of this same treaty, when discussing the negro branch of the question, providing that:

“The Cherokee Nation having voluntarily, in February, eighteen hundred and sixty-three, by an act of their National Council, forever abolished slavery, hereby covenant and agree that never hereafter shall slavery or involuntary servitude exist in their nation otherwise than in punishment of crime, whereof the party shall have been duly convicted in accordance with laws *applicable to all members of said tribe alike*. They further agree that all freedmen who have been liberated by the voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return in six months, and their descendents *shall have all the rights of native Cherokees*; provided, that owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.”

Here, again, we have the same dominant thought and purpose—the firm establishment of civil rights. It is distinctly emphasized that the penal laws shall be “applicable to all members of said tribe alike,” and then that these freedmen shall have “all the rights of native Cherokees.” There is absolutely no vestige of justification for the pretense that the government intended to confer upon these former bondmen any part of the ancestral possessions of the Cherokees. Such a

proposition is preposterous and outrageous upon its face. These people were far less guilty than the people of the several confederate states, and no thought of compelling them to contribute of their material possessions for the benefit of their freedmen was ever entertained. Even the loss of the value in the slave property itself was considered a great hardship, and by many thought to be unjust, but to add to this the penalty of a payment of property to the liberated slaves by their late owners was never dreamed of. We cannot, then, infer such an intention with respect to the freedmen of the Cherokees. Their condition was in no wise worse than that of the freedmen of the southern states, and there is no reason, there is no *excuse* for such a contention. Yet it will be seen that the language here used bears a most striking resemblance to that used in the portions of the treaties referring to the Delawares and Shawnees, and in the agreements entered into under authority thereof. The freedmen were to "have all the rights of native Cherokees."

This brings us to a closer consideration of the proposition upon which the court below base their opinion. As to the objects sought to be accomplished in the beginning, by the treaties and agreement in question, the court seem to agree fully with our view. They say:

"The agreement accordingly provides that the Delawares shall contribute a proportionate amount and be thereafter jointly and severally and equally interested with the Cherokees in the augmented fund. The number of the communal owners was fixed or made ascertainable by the agreement, the amount of the primary fund in the treasury was known, the amount to be paid in was a simple matter of calculation, and the result was that the arrangement left the individual interests of the communal owners precisely what they were before, each Delaware and each Cherokee continuing to receive, directly or indirectly, *per capita*, the same dividend that he

would have received if the merger of their funds had not taken place. This part of the agreement has not been susceptible of misconstruction and concerning it no controversy has arisen.

"There being thus established one communal fund to which all were to contribute equally and in which all were equally to share, the agreement further provides for the sale of land in the Cherokee country to the Delawares which should furnish homesteads for these new inhabitants and future citizens of the Cherokee Nation; and it is this part of the agreement from which the controversy of the case has sprung.

"This land which the Cherokees 'agree to sell to the Delawares for their occupancy' is to be enough for the agricultural homes of the new inhabitants and no more.

"The quantity is fixed at and limited to 'one hundred and sixty acres of land for each individual of the Delaware tribe.'

* * * * *

"It seems plain to the court that this part of the agreement is for the sale of a specific thing for a specific price. It indeed merely fixes the rate per acre at which land may be purchased, and leaves the Delawares free (within certain restrictions) to take as much or as little as they needed. If they took 50,000 acres they would pay \$50,000; if they took 51,000 acres they would pay \$51,000. As a matter of fact, they took 157,600 acres, and paid \$157,600. The money was the consideration named for the land, and the land the consideration named for the money. The Cherokees as grantors conveyed no right or interest other than in the lands sold, and the Delawares as grantees acquired no right or interest in lands other than those for which they paid. As to the communal element of the estate conveyed, considered in the abstract, it is manifest that while the lands granted remained communal they were not owned in common by the Cherokees.

"The right of occupancy and the remote right to the fee were both vested in the Delawares. The agreement expressly excluded the Cherokees from any right of property in the lands of the Delawares, and by implication (in the absence of a provision to the contrary) ex-

cluded the Delawares from any right of property in the lands of the Cherokees. After it was executed and its covenants performed, there would be two communities in the Cherokee country, and each in the matter of property, so far as the agreement was involved, would be independent of the other; but the property rights of both would be subject to the constitution of the Cherokee Nation, and (within constitutional limitations) to the laws of the Cherokee government.

* * * * *

"After all due allowances have been made, it is apparent that the Delawares retained their separate national fund of \$889,191 in the treasury of the United States as their separate property; and that the property of the Cherokees vastly exceeded that which they contributed to the communal estate and the consideration which they paid for a foothold in the Cherokee country. Moreover, as citizens of the nation they have had the benefit of the moneys derived from the Cherokee Strip, and the national fund has been augmented and augmented until it now amounts to \$2,636,634, and to this augmentation the Delawares, as Delawares, have contributed nothing."

But, the court find that the Cherokee Nation has permitted its ambition to soar. In its unguarded moments of self-pride it has allowed itself to borrow fatal expressions from its grand neighbor, and in its public acts has spoken of its unoccupied lands as its "Public Domain." From this, and from the fact that the Cherokee Nation has found it convenient to deal as to its public lands through the medium of a delegate body, the court discovers an analogy to the public domain of the United States, which is the property of the nation as a *political* body, and as to which there are no distinctions among the *citizens* of the nation; and as the Delawares are, by the amendment of the third article of the Cherokee constitution, made *citizens* of that nation, the court conclude that as such citizens they stand in the same light

toward the Cherokee "*domain*," that citizens of the United States do to our public domain.

We are forced to take issue, both with the premise and conclusion of this proposition—the first underlying assumption of it is an error—the Cherokee Nation is *not* a nation in the sense that the United States is a nation. This has been so repeatedly decided by this court that it is hardly necessary to reiterate it.

In the Cherokee Nation *vs.* the Southern Kansas R. R. Co. (135 U. S., 641) this court say:

"The proposition that the Cherokee Nation is sovereign, in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the treaties with the Cherokee Indians, or the decisions of this court, or in the acts of Congress defining the relations of that people with the United States."

That being true, it follows that the Cherokee Nation, so called, cannot and does not possess a "public domain," in the sense that the United States possesses a public domain. It seems to us that the mere statement of these propositions is sufficient to deprive them of all force, and that any attempt at elucidation is more than unnecessary.

Nothing can better demonstrate the fallacy of this contention or more completely disprove the assumption on which the judgment below is based; *i. e.*, the existence of a "national government," in the ordinary sense of that term, or of a "public domain" within and yet distinct from the national government and the public domain of the United States, than the closing chapter of the history of the very leases which are the foundation of the suit at bar.

In February, 1890, President Harrison issued a proclamation as follows:

"Whereas, that portion of the Indian Territory, commonly known as the Cherokee Strip or Outlet, has been for some years in the occupancy of an association or associations of white persons under certain contracts, said to have been made with the Cherokee Nation in the nature of a lease or leases for grazing purposes; and

"Whereas, an opinion has been given to me by the Attorney General, concurring with the opinion given to my predecessor by the late Attorney General, that whatever the right or title of said Cherokee Nation or of the United States to or in said lands may be, no right exists in said Cherokee Nation under the Statutes of the United States to make such leases or grazing contracts, and that such contracts are wholly illegal and void; and

"Whereas, the continued use of said lands thereunder for grazing purposes is prejudicial to the public interests;

"Now, therefore, I, Benjamin Harrison, President of the United States, do hereby proclaim and give notice:

"First. That no cattle or live stock shall hereafter be brought upon said lands for herding or grazing thereon;

"Second. That all cattle and other live stock now on said Outlet must be removed therefrom not later than October 1, 1890, and so much sooner as said lands or any of them may be or become lawfully open to settlement by citizens of the United States; and that all persons connected with said cattle companies or associations must, not later than the time above indicated, depart from said lands."

This proclamation, as stated therein, was based upon the concurrent opinions of two Attorneys General, that no title existed in the said nation to the lands in question, such as to enable the Cherokee Indians to make even leases of these lands that would be legal or binding without the consent of the United States, and pursuant to said proclamation all persons holding cattle on these lands by virtue of such leases were summarily expelled therefrom. It would thus seem that the references to these lands as the "public domain" of the

Cherokee "Nation" was a use of a borrowed term in a play at government, to which the significance attached by the court below is hardly justifiable when it comes to a question of the distribution of more than nine millions of actual money.

Bouvier defines domain to be: "Dominion; territory governed, possession, estate. * * * The right to dispose at pleasure of what belongs to us.

"A distinction has been made between property and domain. The former is said to be that quality which is conceived to be *in* the thing itself, considered as belonging to such or such a person, exclusively of all others. By the latter is understood that right which the owner has of *disposing of the thing*. Hence domain and property are said to be co-relative terms; the one is *the active right to dispose of*, the other a passive quality which follows the thing and places it at the disposition of the owner."

Burrill thus defines domain: "Ownership of land. Immediate or absolute ownership; *paramount or ultimate ownership*. * * * An estate or patrimony which one has in his own right. Land of which one is *the absolute owner*."

Webster defines domain, in its legal sense, as "absolute proprietorship; paramount or sovereign ownership. * * * The territory belonging to a state or general government."

The new Standard Dictionary defines domain to be "a territory or region over which dominion is exercised by a sovereign or other chief authority. * * * Absolute proprietorship in land; *paramount ownership* in an estate."

Thus it will be seen that the very essence of "domain" is the identical thing the Cherokees did *not* possess as to these lands. Such rights, interests and title as they possessed, without attempting to discuss what their nature may have been, were subject to a dominion higher than theirs, and depriving them of all essential at-

tributes as such. As already seen they could not lease, and under the law, they could not sell without the authority and sanction of the United States.

Section 2116 of the Revised Statutes of the United States, provides:

"No purchase, grant, lease or other conveyance of lands or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty," etc.

So it is plain that any analogy sought to be drawn between the landed possessions of these people and the public domain of the United States must be remote and considerably strained as to all considerations of any real consequence in connection with this case.

There is and can be no such analogy between the Cherokee Nation and the United States in respect to the public, national possessions. We cannot imagine such a thing as a sale of our public domain for the purpose of distributing the proceeds pro rata among the "citizens." No such transaction was ever dreamed of. But it always has been and is to-day the central idea of the Indian, whether wild, half civilized or civilized. There has hardly been a session of Congress in a century that legislation has not been enacted looking to the purchase of Indian lands or extinguishment of Indian titles and payment, in some form, to the individual members of the tribe or tribes making the cessions. Some payment, *per capita*, is the almost invariable accompaniment of the transaction, down to the present movement, and so

tenacious are they of this idea that without it the effort to negotiate treaties would be a futile undertaking.

But these are not the only errors into which the court below has fallen. It will be noticed that there are two distinct branches or parts to the contract in question; one providing for the purchase of a given quantity of land (157,600 acres) for one consideration, and another providing for the payment to the Cherokee Nation of an amount (\$121,824.28) being an amount bearing the same relation to the Cherokee national fund as the number of Delawares to the number of Cherokees.

Singularly, the court below, in one place holds, with us, that no misunderstanding did or could arise out of the first branch of this contract; *i. e.*, as to the purchase of land. In another part of the opinion they declare with equal emphasis that it could not arise out of the latter provision; *i. e.*, with reference to the purpose contemplated by the pro rata payment into the national fund; thus showing that the court below wholly failed to divine the true issue in this case.

The court (page) speaking of the land purchase, say (the italics being ours)

"It seems plain to the court that this part of the agreement is for the sale of a specific thing for a specific price. It indeed merely fixes the rate per acre at which land may be purchased, and leaves the Delawares free (within certain restrictions) to take as much or as little as they needed. If they took 50,000 acres they would pay \$50,000; if they took 51,000 acres they would pay \$51,000. As a matter of fact, they took 157,600 acres, and paid \$157,600. The money was the consideration named for the land, and the land the consideration named for the money. The Cherokees as grantors conveyed no right or interest other than in the lands sold, and the Delawares as grantees acquired no right or interest in lands other than those for which they paid."

* * * * *

"The agreement expressly excluded the Cherokees from any right of property in the lands of the Delawares, and by implication (in the absence of a provision to the contrary) *excluded the Delawares from any right of property in the lands of the Cherokees.* After it was executed and its covenants performed, there would be two communities in the Cherokee country, and each in the matter of property, so far as the agreement was involved, would be independent of the other."

Again (page) speaking of the equalizing payment, they say:

"The agreement accordingly provides that the Delawares shall contribute a porportionate amount and be thereafter jointly and severally and equally interested with the Cherokees *in the augmented fund.* The numbers of the communal owners was fixed or made ascertainable by the agreement, the amount of the primary fund in the treasury was known, the amount to be paid in was a simple matter of calculation, and the result was that the arrangement left the individual interests of the communal owners precisely what they were before, each Delaware and each Cherokee continuing to receive, directly or indirectly, *per capita*, the same dividend that he would have received if the merger of their funds had not taken place. *This part of the agreement has not been susceptible of misconstruction and concerning it no controversy has arisen.*

Now, if both these propositions are true, then there is no controversy. If both these propositions are true, the defendent below, the Cherokee Nation, was entitled to a decree, the two propositions covering every question contended for by us.

But the court proceed:

"There being thus established one communal fund to which all were to contribute eqally, and in which all were equally to share, the agreement further provides for the sale of land in the Cherokee country to the Delawares which should furnish homesteads for these new

inhabitants and future citizens of the Cherokee Nation; and it is this part of the agreement from which the controversy of the case has sprung."

"This part of the agreement" is the same part first above quoted, as being simple, direct and too plain to be misunderstood. But the last above quoted proposition is not only in conflict with the first proposition, if the decree of the court below is to have anything to rest on, but it completely misstates the issue. That is *not* the "part of the agreement from which the controversy of the case has sprung." That is just the part of the agreement over which there could be and is no question of controversy possible. As stated by the court in its first above quoted proposition, this part of the agreement was for the purchase and sale of a "specific thing for a specific price," which was paid, and that was and is the end of it. This controversy has arisen *wholly* out of the other branch of the agreement, which the court say "*has not been susceptible of misconstruction!*" As we understand this case, and having been professionally connected with the controversy for years before this suit was brought or authorized to be brought, we think we are pretty well informed concerning it, the whole controversy is as to the extent, reach and character of the "rights and immunities" that passed to the Delawares in consideration of \$121,824.28 paid into the general (national) fund of the Cherokees. Was this payment for equal enjoyment of Cherokee citizenship, schools, charities and public institutions, or was it to also purchase an interest in the immense unoccupied territory of the latter? If it was intended as such property purchase, why was it not named in a sum large enough to pay at least *some part*, even though comparatively small, of the value of those lands, instead of the *exact amount* by which the in-

coming Delawares would increase the current, running expenses of the Cherokee public establishment?

We contend here, and contended in the court below, exactly as the court state, that "this part of the agreement has not been susceptible of misconstruction," and as there never has been any controversy over the other part of the contract, and no way, apparently, in which one could possibly arise, we are not quite clear as to what the court below founded its decree upon.

Again, we are not altogether clear as to how much force the court below give to the communal character of the Cherokee holding. At one time they say: "The primitive control of the uses to be made of the land has passed from the communal owners and become lodged in the State," etc., and yet they argue continually on the communal character of the title, stating that "the legislation of the Cherokees recognizes again and again the communal character of the seizin or occupancy of the land." We do not regard this inquiry as at all essential to a proper and just determination of the present controversy. It is certain that the Cherokee Nation, so called, possessed, at the time the contract in question was entered into, a vast territory, which it held as a political body or as a community, and of which it was guaranteed the peaceful possession by our government; that it was the policy of our government to encourage settlement among these people of friendly Indians, of whites and others, and that these affiliated persons or bodies should have the benefit of citizenship and all civil rights, unimpaired. We do not believe it was *ever* in contemplation by our government, by the Cherokees or by their adopted citizens, that by permitting this privilege the Cherokees were parting with "the heritage of their fathers and the patrimony of their children." Such a proposition is repugnant to

every sentiment of fair dealing and not in accordance with the usual methods of business transactions. There is no reason why the Cherokees could not permit the residence of foreigners among them, with all political rights and benefits, without giving them of their lands and possessions. The Cherokee Nation to-day has a larger population of adopted whites than of Delawares. These adopted whites were made "citizens" by the same amendment to the constitution that the Delawares were. They vote, hold office, enjoy the schools and public institutions, but not one has ever had the temerity to claim an interest in the unoccupied lands of the nation, and the government has never treated them as having any vestige of claim thereto. These people have just as good a claim as the Delawares and Shawnees, and if the judgment of the court below is to stand, then the Delawares and Shawnees will take too much by the decree, as the funds belong not to the Cherokees, Delawares and Shawnees alone, but to the negroes and adopted whites as well—in short, to the whole Cherokee citizenship—no matter what its character.

It is certain that there was no *community* of title or interest between these peoples, except as to public *administration* and police control. The ownership of the Delawares in their 157,600 acres was *exclusive*. Their use and benefit of nearly a million dollars of their own invested funds were exclusive. What is there in this that hints at a community of material interest?

The court below say:

"Nevertheless, after all due allowances have been made, it is apparent that the Delawares retained their separate national fund of \$889,191 in the treasury of the United States as their separate property; and that the property of the Cherokees vastly exceeded that which they contributed to the communal estate and the

consideration which they paid for a foothold in the Cherokee country."

* * * * *

"The Delawares, when they entered into the agreement, had no right to expect that the land of the Cherokees would be sold and that they would be admitted to share in the proceeds by virtue of either their *purchase* or their *citizenship*. They cannot now say that they were induced to enter into the agreement on the faith of any such expectation."

It certainly cannot be held that they will be permitted to realize from this unexpected source without first complying with the requirement of the second subdivision of the fifteenth article of the treaty of 1866, by paying into the Cherokee National fund an amount equal to the probable proceeds of the "lands herein authorized to be ceded or sold;" *i. e.*, the strip lands, and these same lands west of 96°. We do not understand that courts of equity favor the taking of the property of one and giving it to another, without compensation. We do not understand that the courts even look kindly upon contracts which clearly intend such a transaction. We even understand that courts will disfavor contracts that do not stand on fair and just considerations, and where there is any doubt or room for interpretation, will so construe them as to make them mean that which is fair and just. The application of such rules to this case is all we ask. The appellee is not asking a decree founded upon justice. He asks for a strict construction of his contract—of its *letter*. He wants "the due and forfeit of his bond." The court below admit the injustice that is worked by the interpretation they put upon this instrument, and apologise for it through every line of their opinion!

We agree with the court below, that the language of the law of the Cherokee Nation allowing citizenship by intermarriage is significant:

“Provided, also, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the national treasury a sum of money to be ascertained and fixed by the National Council equal to the “pro rata” share of each native Cherokee, in the lands and vested wealth of the nation, estimated at five hundred dollars.”

Here we have an affirmative declaration of two things very important in this connection. First, that there are *citizens* of the Cherokee Nation *whose rights and privileges are limited and abridged*. In other words, who are *equal* with native Cherokees in all respects, *except property rights*. If the proposition of the court below were true, that the Cherokee “citizen” stands in the same light to the Cherokee Nation that a “citizen” of the United States does to our government, were true, then this condition of *limited* or restricted citizenship could not exist, for no such anomalous relationship can exist with us. Second, it is a direct statement of the *per capita* value placed by the Cherokee Nation upon its “lands and vested wealth.” This is a wholly disinterested witness. This value was fixed without any thought of any bearing it might ever have upon the Delaware-Shawnee question, for their unreasonable claim had at that time never been suggested or thought of, and was not for years after this law had been enacted. Now to pay for a share in the “lands and vested wealth” of the Cherokees, for 985 Delawares on this basis, would have required \$492,500.00. They actually paid for the “rights and immunities * * * as native Cherokees” \$121,824.28! which was exactly the right proportion for an interest in the “lands and wealth” of the Cherokees, *except* the strip lands and lands lying west of the 96°, which others, who were to participate therein, were compelled to pay for. Thus it will be seen

that every step in the history of these people, every circumstance of their relation with the outside world, every utterance past or present that can be invoked as a witness is in confirmation of the theory of the meaning of this contract that the circumstances surrounding the making of it, and the equities of the situation import.

The mere fact that the Delawares and Shawnees came into the Cherokee country under the formality of a contract, does not carry with it any force beyond the terms thereof. They could not have a foothold in this country without a contract and a price. The treaties between the Cherokees and the United States guarantee to these people protection from intrusion upon their lands without their consent. No white man, no Negro, no Indian could acquire a settlement, except by an arrangement with them. They have provided generally for the admission of certain persons by intermarriage, and others by adoption, and as to them they have provided *limitations* upon their rights and privileges as Cherokee "citizens," except upon certain conditions, to wit: the payment of an amount equal to the *per capita* wealth of the Cherokees, on a conservative estimate, showing the indisposition of these shrewd people to permit a gradual reduction and perhaps final dissipation of individual, *per capita* wealth among them which would otherwise occur.

If the position of the appellees can be maintained, then they can claim a pro rata interest in the home reservation (about 5,000,000 acres) within which they have purchased and are the absolute owners of 157,600, and of which, as in the case of the "Strip" and "Outlet" lands, no account was taken in the agreement between the the parties as a basis of contribution by the Delawares, and in case of allotment in severalty or sale of the lands they would not only be entitled to the 160

acres per head already owned by them, but also a pro rata share in this vast tract of land, and would in the end take a much larger distributive share than the native Cherokee would have out of his patrimony.

In Conclusion.

Our contentions in this case are:

First. That under article four of the Delaware treaty of July 4th, 1866 (14th, Stat., 794) the amount of land to be purchased for that tribe was limited to 160 acres to each man, woman and child.

Second. That under the fifteenth article of the Cherokee treaty of July 19th, 1866 (Id. 803) it was agreed that the United States might settle friendly Indians in the Cherokee country, east of the 96° upon terms to be agreed upon by the parties, subject to the approval of the President of the United States.

Third. That by that article two plans were provided by which Indians might be settled in the Cherokee country: (a) where they abandon their tribal relations and (b) where they preserved their tribal organization.

Fourth. That those abandoning their tribal relations were to pay into the Cherokee national treasury a sum of money bearing the same relation to the then existing national fund that their numbers bore to the whole number of Cherokees, as their proportionate contribution toward the increased expenses of the government incident to their citizenship, and they were thereby to become entitled to share in all the benefits of that government, including civil and political rights and immunities, and the right to occupy and use lands within the home reservation the same as native Cherokees; but that they were not, by reason of such payment, to be entitled to any share in any of the lands belonging to the Cherokee Nation.

Fifth. The Indians electing to preserve their tribal organization were to have set apart to them an amount of land equal to 160 acres for each man, woman and child, and were to pay into the Cherokee national fund a sum of money in the proportion to the existing national fund and *the probable proceeds of the strip lands in Kansas, and the lands west of the 96°*, that their number bore to the number of Cherokees.

Sixth. That the Delaware Indians elected to maintain their tribal organization and have so maintained it to the present time.

Seventh. That the lands ceded by that treaty are those described in the seventeenth article thereof, and known as the "Neutral lands," about 800,000 acres and the "Strip lands," about 400,000 acres, and the lands authorized to be ceded and sold are those lying west of the 96° known as the "Outlet lands," and containing about 8,000,000 acres.

Eighth. That by the agreement between the Cherokees and Delawares, it was provided (to the end that there might be no mistake thereafter as to the amount to be contributed to the Cherokee national fund by the Delawares) that the whole amount of the invested funds of the Cherokees was \$678,000.00, to which there was to be added the sum of \$1,000,000.00, being the estimated value of the Cherokee Neutral lands in Kansas; thus making the whole Cherokee national fund \$1,678,000.00, which was to be taken as the basis for calculating the amount which the Delawares were to pay into the common fund, and the Delawares made payment in accordance therewith.

Ninth. That the Delawares did not then and have not since paid into the Cherokee national fund a proportion equal to the probable proceeds of the "Strip lands" (about 400,000 acres) ceded, by said treaty, or the "Outlet lands" (about 8,000,000 acres) authorized to be ceded or

sold, or any part thereof as required by the second subdivision of article fifteen of the Cherokee treaty.

Tenth. That under the fourth article of the Delaware treaty and the fifteenth article of the Cherokee treaty the Delawares (maintaining their tribal organization) purchased 157,600 acres of land from the Cherokees, being 160 acres for each man, woman and child, and paid therefor \$157,600.00.

Eleventh. That the Delawares retained a separate national fund of \$889,191 in the United States Treasury as their separate property which has lately been paid out *per capita* to Delawares only. (26 Stat., 1011; 27 Stat., 617.)

Twelfth. That the Cherokee national fund, since the the date of the agreement with the Delawares, has been vastly augmented and now amounts to \$2,636,634 in the proceeds of which the Delawares have participated, contributing nothing thereto as required by the second subdivision of article fifteen of the Cherokee treaty of 1866.

Thirteenth. That the Cherokee Nation has always had, and has to-day, several classes or degrees of citizenship, unlike anything known to our form of government, a large proportion of its citizens having no interest in the "lands or vested wealth" of the nation.

Fourteenth. That the relation of the Cherokee to his unoccupied land is wholly different from that of the citizen of the United States toward our public domain. It is *sui generis*, and without an analogy anywhere. These lands have always been regarded as property in which each individual had a separate, personal interest. Not such that he could demand a partition, but such that when the whole should be sold, each would receive his part. It was a modified, joint tenancy—a non-descript—but as to which the purpose and intent of the owners is clear and unmistakable.

Fifteenth. That the "rights and immunities" which were intended by the Cherokees to be conferred, and intended by the Delawares to be received and enjoyed, were the rights and immunities of citizenship and good government, paid for and maintained by the interest arising from the national (invested) fund, and nothing more.

Sixteenth. That there was no "mutuality" between the Cherokees, Delawares and Shawnees, except as to current expenses of the government, and that even as to this, both the Delawares and Shawnees failed to sustain their part; that as to tribal wealth, or resources the Delawares and Cherokees each retained something from the common till—the Delawares about \$900,000.00 in money (since paid to them *per capita*); the Cherokees the home reservation, strip lands and lands west of the 96°; the Shawnees nothing, because they had nothing.

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